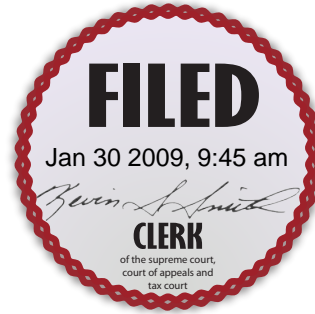


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

EUGENE E. CLARK,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 32A05-0807-CR-446
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Stephenie D. LeMay-Luken, Judge
Cause No. 32D05-0804-FD-51

January 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Eugene E. Clark challenges his three-year sentence following his guilty plea to Class D felony resisting law enforcement.¹ Specifically, Clark contends that the trial court abused its discretion in finding “six aggravating circumstances where only three aggravating circumstances were appropriate” and in finding “only two mitigating circumstances where four mitigating circumstances were clearly supported by the record and advanced for consideration.” App. Br. p. 7. Clark further alleges that his sentence is inappropriate in light of his character and the nature of his offense. We affirm.

FACTS AND PROCEDURAL HISTORY

On April 11, 2008, Plainfield Police Officer Todd Knowles initiated a routine traffic stop after he noticed that the temporary license plate on the vehicle which Clark was driving was expired. Officer Knowles noticed that Clark had a young child sitting unrestrained on the floorboard of the passenger side of the car. Clark claimed that he “had some behavior problems with [the child], so he moved him up front. To keep a better eye on him.” Tr. p. 30.

After speaking with Clark for a few minutes, Officer Knowles removed Clark from his vehicle, ran a check of Clark’s Arizona driver’s license, and called for backup because he “didn’t get a real good feeling about the way [Clark] was acting [and was] [n]ot real comfortable with the way the kid was sitting and, and acting in the car.” Tr. p. 31. The report on Clark’s driver’s license indicated that Clark’s license had been canceled or suspended and that Clark was wanted in Arizona on a warrant. Two backup officers arrived

¹ Ind. Code § 35-44-3-3 (2007).

and Officer Knowles “gave them the sign to go ahead [and] detain [Clark] until [they] found out the status of the warrant.” Tr. p. 32. Clark resisted the backup officers’ attempts to detain him and ran back to his vehicle. Officer Knowles then ran toward Clark’s vehicle, deployed pepper spray into Clark’s face, and tried to pull Clark’s arms off of the steering wheel.

While Officer Knowles was holding onto Clark’s steering wheel, Clark started the vehicle, put it in gear, and began to drive away. Clark drug Officer Knowles for approximately twenty to thirty yards before Officer Knowles fell to the ground. Clark ran over Officer Knowles’s left foot as he drove away. Clark then led police and members of the Hendricks County Sheriff’s Department on a high speed chase through the streets of Plainfield. The chase covered approximately four to five miles through two subdivisions and a construction zone at speeds as high as sixty miles per hour. Clark continued at high rates of speed even after Officers deployed “stopsticks” which punctured his tires. Tr. p. 43. Two Hendricks County Sheriff’s Deputies eventually stopped Clark’s vehicle by performing a rolling road block. Clark then grabbed the young child “like a football” and fled on foot. Tr. p. 47. Officers caught up to Clark about one or two hundred feet away and wrestled the child away from him. Clark continued to fight the officers, who eventually deployed a taser in order to detain him.

On April 11, 2008, Clark was charged with twenty counts, including Class D felony resisting law enforcement while operating a motor vehicle. Clark pled guilty to Class D felony resisting law enforcement, and, in exchange, the State dropped the remaining nineteen

charges. On July 16, 2008, Clark was sentenced to three years of incarceration.

DISCUSSION AND DECISION

I. Abuse of Discretion

Clark contends that the trial court abused its discretion in imposing the maximum three-year sentence after finding “six aggravating circumstances where only three aggravating circumstances were appropriate” and in finding “only two mitigating circumstances where four mitigating circumstances were clearly supported by the record and advanced for consideration.” App. Br. p. 7. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh’g*, 875 N.E.2d 218 (Ind. 2007). “An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable probable, and actual deductions to be drawn therefrom.” *Id.* (quotation omitted).

[U]nder the new statutory regime Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. In order to facilitate its underlying goals, the statement must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating.

Id. (citation omitted).

A. Aggravating Factors

Clark claims that the trial court abused its discretion in considering improper

aggravating factors at sentencing. The approach employed by Indiana appellate courts in reviewing sentences is to examine both the written and the oral sentencing statements to discern the findings of the trial court. *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007) (citing *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002)). We examine both the trial court's oral statement and written sentencing statement alongside each other to assess the conclusions of the trial court. *Id.* Appellate Courts have the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing. *Dowell v. State*, 873 N.E.2d 59, 60 (Ind. 2007). Here, the trial court has issued conflicting sentencing statements insofar as the written sentencing statement includes six aggravating factors, while the oral sentencing statement contains only four. Therefore, we will examine both statements alongside each other to assess the conclusions of the trial court. *See McElroy*, 865 N.E.2d at 588.

1. Criminal History

The first aggravating factor included in trial court's written sentencing statement reads as follows:

The Defendant has a history of criminal activity as shown on the Pre-Sentence Report. The Court notes that the Defendant's criminal history is specifically related to the instant offense of Resisting Law Enforcement. Defendant has two prior convictions for Resisting Law Enforcement/Resisting Arrest. The Court also finds that the Defendant's criminal history includes violent crimes specifically Resisting Arrest and Domestic Battery.

Appellant's App. p. 73. Likewise, the trial court's oral sentencing statement provides as follows:

The third aggravator is that there is a history of criminal or delinquent activity.

That the criminal, and, and that the criminal history is specific to the offense of resisting law enforcement in that, the Defendant has two (2) prior convictions for resisting law enforcement in 2001. It's not enough that it's just criminal history, it's a, it is significant because it's directly related to this incident, offense.

Tr. p. 119. Indiana Code section 35-38-1-7.1(a)(2) (2007) establishes that the trial court may consider a defendant's criminal history to be an aggravating factor at sentencing. Therefore, we conclude that the trial court acted within its discretion in finding Clark's criminal history to be a substantial aggravating factor.

2. Probation Violation

The second aggravating factor included in trial court's written sentencing statement reads as follows: "The Defendant has previously violated the conditions of Probation." Appellant's App. p. 73. Additionally, the fourth aggravating factor included in the trial court's written sentencing statement reads as follows: "Defendant has been offered the services of probation, counseling and electronic monitoring but continues to re-offend. Defendant no longer qualifies for the least restrictive environment as a form of punishment or rehabilitation. Incarceration is appropriate in order to protect the public and law enforcement officers." Appellant's App. p. 73. Clark argues that the trial court abused its discretion in finding both of these aggravators because they are essentially the same.

With respect to these aggravators, the trial court's oral sentencing statement provides as follows: "Your fourth aggravating circumstance, is that you've been previously offered the services of probation and electronic monitoring [] and have violated those. The next step sir is incarceration." Tr. p. 119. The trial court's oral sentencing statement clearly demonstrates

that the trial court found Clark's prior probation violations and the likelihood that he would reoffend if not incarcerated to be one aggravating factor. Indiana Code section 35-38-1-7.1(a)(6) provides that the trial court may consider a defendant's violation of the conditions of any probation, parole, or pardon to be an aggravating factor. In addition, Clark's likeliness to reoffend may properly be considered by the trial court when determining the weight attributable to Clark's prior probation violations. *See Neff v. State*, 849 N.E.2d 556, 560 (Ind. 2006). Therefore, in reviewing these statements side by side, we conclude that the trial court's oral sentencing statement accurately pronounces, as a single aggravating factor, the trial court's determination that Clark has previously violated his probation and is likely to reoffend if not incarcerated. We further conclude that the trial court acted within its discretion in finding Clark's probation violation and the probability that he would reoffend to be an aggravating factor.

3. Presence of Minor

The third aggravating factor included in trial court's written sentencing statement reads as follows: "The Defendant disregarded the safety and welfare of his own 3 year old child putting the child at significant risk by operating a vehicle without the child properly restrained, fleeing the law enforcement with the child in the vehicle and fleeing on foot while carrying the child." Appellant's App. p. 73. Additionally, the sixth aggravating factor included in the trial court's written sentencing statement reads as follows: "A child under the age of 17 witnessed the offense." Appellant's App. p. 73. Clark argues that the trial court abused its discretion in finding these aggravators because the possibility that a child will

suffer significant emotional or physical injury is inherent when that child witnesses a crime.

With respect to these aggravators, the trial court's oral sentencing statement provides as follows:

Number two, is the presence of a three (3) year old child being Mr. Clark's own child. Mr. Clark and nobody else, sir nobody else put that child in that position. There's a car seat in the back and you have a three (3) year old bouncing around your car sitting on the floorboard.... And now he fears [the police] because he got over-sprayed from pepper spray that was directed towards you, to him.... Further, there's an emotional trauma for a child, any child, a three (3) year old child, your son witnessed you being arrested in this fashion.... You took him through a high speed chase through the Town of Plainfield which is never not busy. There are always cars. And this is broad daylight.... He had to watch you being tasered and he was terrified by the officer's testimony.

Tr. pp. 117-18 (emphasis omitted). Indiana Code section 35-38-1-7.1(a)(4) provides that the trial court may consider the fact that the defendant committed a crime of violence in the presence of a person who is less than eighteen years of age and is not the victim as an aggravating factor. We believe, however, that a trial court, which is not limited to the statutory aggravators listed in Indiana Code section 35-38-1-7.1(a), acts within its discretion if, in light of the circumstances of the particular matter, it determines that the fact that the defendant committed *any* criminal offense, even a nonviolent one, in the presence of a minor, who is not the victim, to be an aggravating factor at sentencing. *See* Indiana Code section 35-38-1-7.1(c). Therefore, here, we conclude that the trial court acted within its discretion in finding Clark commission of the offense in the presence of his three-year-old to be an aggravating factor.

“Further, a court may find that the factual details of the manner in which the crimes

were committed constitute an aggravating circumstance as long as its finding is a particularized account of the aspects of the crime which illustrated to the court the defendant's deservedness of an enhanced sentence rather than a bare recitation of the elements of the charges." *Wethington v. State*, 560 N.E.2d 496, 509-10 (Ind. 1990). Here, the evidence supports the trial court's determination that Clark's actions put his three-year-old son at significant risk of either physical or mental harm. Had Clark cooperated with Officer Knowles, he would have at most received a few traffic citations. Instead, however, Clark decided to lead officers on a high speed chase through the Town of Plainfield while his son sat unrestrained on the passenger side floorboard. Clark then decided to carry his son "like a football" and to flee the officers on foot. Tr. p. 47. In light of these facts, we conclude that the trial court acted within its discretion in determining that Clark's endangerment of his son was an aggravating factor at sentencing.

Furthermore, even if the trial court had abused its discretion in considering these factors separately, upon reviewing these sentencing statements side by side, we conclude that the trial court's oral sentencing statement accurately pronounces, as a single aggravating factor, the trial court's determination that in committing the instant offense in the presence of a three-year-old child, Clark exposed the child to the risk substantial emotional and physical harm. The trial court acted within its discretion in finding Clark's actions involving his son to be an aggravating factor at sentencing.

4. Injury to Officer Knowles

The fifth aggravating factor included in trial court's written sentencing statement

reads as follows: “Officer Todd Knowles was injured during the commission of this crime. Officer Knowles continues to have physical scars from injuries.” Appellant’s App. p. 73. With respect to Officer Knowles’s injury, the oral sentencing statement provides as follows:

First of all, there was an injury to Officer Todd Knowles. That is not an element of the crime in this case. And I do find that it is a significant factor. Each and every police officer in any community knows, the riskiest thing they do is going into the unknown.... When you pull somebody over for anything on the side of the road, you do not know what you are going to face. You can face somebody who is lovely and pleasant and smiles and calls you sir or ma’am. Or, you can face somebody who’s aggravated because they got pulled over and they’re going to get a ticket. All the way up to somebody who injures you. Or shoots you and puts you in the hospital. They never know. And so that injury, I’m going to put a significant weight.

Tr. pp. 117-18.

Clark argues that Officer Knowles’s injury was not significant and therefore the trial court abused its discretion in finding it to be an aggravating factor at sentencing. We disagree and observe that the evidence establishes that it was by mere luck that Officer Knowles’s injury was not much more serious, or even fatal. Testimony from other officers at the scene indicates that had Officer Knowles rolled in a slightly different direction, Clark’s vehicle would have run over Officer Knowles’s head rather than his foot. As it is, Officer Knowles continues to suffer from pain and has permanent scars as a result of the incident.

Indiana Code section 35-38-1-7.1(a)(1) states that the trial court may consider that “the harm, injury, or damage suffered by the victim of an offense was: (A) significant; and (B) greater than the elements necessary to prove the commission of the offense” to be an aggravating factor. However, the trial court was not limited to considering only the statutory

aggravators and may find that the factual details of the manner in which the crime was committed constitutes an aggravating factor. *See* Ind. Code § 35-38-1-7.1(c); *Wethington*, 560 N.E.2d at 509. We recognize the danger associated with police work and note our belief that any injury to an on-duty police officer that is caused by a defendant during the commission of a crime may properly be considered as an aggravating factor. Therefore, we conclude that, here, the trial court acted within its discretion in finding the fact that Clark's actions resulted in injury to Officer Knowles to be a significant aggravating factor at sentencing.

B. Mitigating Factors

Clark also claims that the trial court failed to find two mitigating factors which were clearly supported by the record and advanced for consideration. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemeyer*, 868 N.E.2d at 493. "However, '[i]f the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist.'" *Id.* (quoting *Fugate v. State*, 608 N.e.2d 1370, 1374 (Ind. 1993)). Clark raised four potential mitigating factors before the trial court: (1) he pled guilty; (2) his remorse; (3) the undue hardship his incarceration would have on his three children; and (4) his substance abuse. The trial court found Clark's guilty plea and his remorse to be mitigating factors at sentencing.

1. Undue Hardship on Defendants

The trial court specifically rejected Clark's claim that his incarceration would create an undue hardship upon his family, stating that it "does not find as a mitigating circumstance that the Defendant's family will suffer a hardship if he is incarcerated." Appellant's App. p. 74. The trial court noted that Defendant had no proof of employment, but claimed to be starting a business. The trial court found that any hardship on Defendant's family was caused by the Defendant himself. Appellant's App. p. 74. Clark, however, claims that the trial court ignored the testimony of his wife who stated that Clark's incarceration would be a financial burden upon the family. Clark's wife testified that Clark was generally a good provider, but admitted that he was only able to provide for his family financially during periods when he was not using drugs or alcohol. Clark's wife described multiple, seemingly reoccurring, episodes of drug and alcohol use by Clark and admitted that Clark had abandoned the family five days prior to the instant offense to go on a drug binge. Clark's wife also testified that she had obtained a protective order against Clark on behalf of their children. In light of Clark's wife's testimony regarding his inability to provide for his family during reoccurring periods of drug and alcohol use, we conclude that the undue hardship Clark's incarceration would place upon his family is neither significant nor clearly supported by the record. Thus, the trial court did not abuse its discretion in rejecting this proffered mitigating factor.

2. Substance Abuse

Clark also claims that the trial court abused its discretion in rejection his alleged substance abuse as a mitigating factor. The trial court did not specifically reject Clark's claim that his substance abuse should be considered a mitigating factor at sentencing.

However, the trial court was not required to do so. *See Anglemeyer*, 868 N.E.2d at 493 (providing that the trial court is not obligated to explain why it has found that a specific mitigating factor does not exist). “A history of substance abuse is sometimes found by trial courts to be an aggravator, not a mitigator.” *Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002), *trans. denied*. “A trial court is not required to consider as mitigating circumstances allegations of appellant’s substance abuse or mental illness.” *James*, 643 N.E.2d at 323. The evidence establishes that while Clark had been on a cocaine binge during the five days preceding the instant offense, he was not under the influence of drugs or alcohol when he resisted law enforcement and led officials on a high speed chase through Plainfield. The evidence also establishes that Clark has a substantial history of substance abuse, but has never voluntarily sought help for his addiction or successfully completed court-ordered treatment. In light of the evidence presented at sentencing, we conclude Clark’s wife’s assertion that Clark is not going to receive the rehabilitation that he needs if incarcerated in the Department of Correction does not establish that the alleged mitigating evidence was significant or clearly supported by the record. Thus, the trial court did not abuse its discretion in rejecting this proffered mitigating factor.

II. Appropriateness of Sentence

Clark next contends that his sentence was inappropriate in light of the nature of his offense and his character. Appellate Rule 7(B) provides that “[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the

character of the offender.” Upon review, we grant deference to a trial court’s sentencing decision because we understand and recognize the unique perspective a trial court brings to its sentencing decisions. *Stewart v. State*, 866 N.e.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade the appellate court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the nature of Clark’s crime, we observe that Clark led officers on a high speed chase through multiple residential additions and construction areas in Plainfield before abandoning his car, carrying his young son “like a football” and attempting to evade the officers on foot. Tr. p. 47. Clark continued to resist officers until one officer deployed his taser to subdue Clark. Clark’s actions displayed disregard for not only the safety of the officers involved in the chase, but also for the safety of his young son and the citizens of Plainfield.

Additionally, with regard to Clark’s character, we observe that Clark has a criminal history, a history of substance abuse, and a history of violent behavior toward his wife and children. Clark’s criminal history includes prior convictions for receiving stolen property, theft, domestic violence/battery, failure to appear, driving under the influence, resisting arrest, and operating a vehicle without a license. In addition, the evidence establishes that on various occasions, Clark abandoned his family in favor of drug binges. The evidence also establishes that on one occasion, while Clark was “high,” he “basically drug [his wife] across the parking lot by [her] hair,” and on another occasion, after returning from one of his “little binges,” Clark came home, began arguing with his wife, and spat on both her and the

couple's daughter. Tr. p. 84, 86. Further, we note that during the commission of the instant offense, Clark recklessly endangered the life of his three-year-old son who was sitting, unrestrained, on the floorboard of the vehicle. As a result of Clark's violent and reckless behavior, Clark's wife has obtained a protective order against Clark on behalf of their children. Given the dangerous nature of Clark's offense, his criminal history, and his history of violent and reckless actions toward his wife and family, Clark has failed to persuade us that his three-year sentence is inappropriate. We therefore conclude that Clark's three-year sentence is appropriate.

In sum, the trial court did not abuse its discretion in sentencing Clark and Clark has failed to meet his burden of proving that his sentence is inappropriate in light of the nature of Clark's offense or his character.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.